

The Honorable Marsha J. Pechman  
The Honorable Theresa L. Fricke

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA**

JUSTIN E. LEWIS,

Plaintiff,

v.

RYAN PUGH,

Defendant.

NO. 3:17-cv-5227-MJP-TLF

LCR 37(a)(2) EXPEDITED JOINT  
MOTION REGARDING DISCOVERY

NOTE ON MOTION CALENDAR:  
August 19, 2019

**I. DEFENDANT'S INTRODUCTORY STATEMENT**

Pursuant to Fed. R. Civ. P. 26(c), Defendants move for a protective order exempting the production of use of force policies that were and are in effect at the prison and exempting production of video surveillance footage from fixed camera emplacements within the prison.

The policies and related training materials have been produced with redactions. A privilege log sets out the documents that are involved. The Declaration of Assistant Director Herzog of the Department of Corrections authenticates the redacted policies and materials.

The production of video footage was addressed with the Court and Mr. Lewis at the time of the Declaration of Steven DeMars (dkt. no. 53, redacted) and the defendant now offers additional argument about why further inquiry into the video surveillance should not be had.

Producing to the plaintiff, an active inmate, such policies and related materials or further information about the video surveillance system could seriously compromise prison security. *See Florer v. Schrum*, 2012 WL 2995071 (W.D. Wash. July 23, 2012). Accordingly, Defendants ask the Court to issue a protective order precluding production. At a minimum, the Court should review the materials in camera before ordering any production to satisfy itself as to the relevance of the materials. Only after that should the Court consider production, setting appropriate terms and conditions to prevent secondary disclosure.

## II. PLAINTIFF'S INTRODUCTORY STATEMENT

The Plaintiff seeks production of the absolute minimum information necessary to pursue his claim. This is not a public records request, and the arguments by the Defendant about potential future security concerns pale in comparison to the actual question in this case—whether Officer Ryan Pugh violated Mr. Lewis's constitutional rights by striking him in the face while he was handcuffed behind his back. It is impossible to answer this question without further understanding of the Department of Corrections' Use of Force Policies, including whether the type of force used by Defendant is ever acceptable and in what situations.

Further, Plaintiff deserves a full and fair opportunity to examine whether stationary video surveillance devices recorded the incident—taking the word of Department employees is not enough. Plaintiff deserves an opportunity to ask questions about whether stationary video surveillance could have viewed the incident but were not recording at that time, why they were not recording if that is the case, and whether it is possible a Department employee witnessed the incident live on video that was not recorded. These questions are necessary to investigate whether Department staff could be covering for Officer Pugh, whether video evidence may have been spoliated, whether procedures governing the surveillance of the area in question were ignored.

Plaintiff also seeks an Order allowing questions of deponents along these lines. For instance, to ask any officers present during the incident whether they received training in the

1 type of force used against Plaintiff and whether it is considered an acceptable use of force in this  
2 situation by department policies.

3 To avoid a lengthy in camera review by the Court, Plaintiff is offering to view the  
4 documents and video as Attorneys' Eyes Only at a time and location of Defendant's choosing.  
5 Plaintiffs' attorneys will identify specific documents necessary for argument and agree to keep  
6 them strictly confidential, filing any pleadings that cite to confidential information in a sealed  
7 format. Plaintiff respectfully requests this Court to issue an Order on these terms.

### 8 III. DISPUTED DISCOVERY

9 The court is familiar with the details of the incident in question. The case involves Officer  
10 Pugh's use of force on one occasion at Washington Corrections Center in Shelton, Washington  
11 (see dkt nos. 61 and 65). The discovery dispute arises from the defendant withholding use of  
12 force policies, related materials, and information about video surveillance emplacements under  
13 claim of privilege for security. The privilege log that accompanied the initial disclosures of the  
14 defendant Ryan Pugh included these items and claims of privilege:

	<b>DOC POLICY 410.200, USE OF FORCE</b>	
00700001-26	DOC restricted policy 410.200, Use of Force, revision date 6-23-14. DOC security information redacted.	RCW 42.56.240(1)
	<b>WCC OPERATIONAL MEMO, USE OF FORCE</b>	
00800001-27	Washington Corrections Center Operational Memorandum, WCC 410.200, Use of Force, revision date 6-24-16. DOC security information redacted.	RCW 42.56.240(1)
	<b>CONTROL TACTICS TRAINING MATERIALS</b>	
01400001-3	2016 Control Tactics Practical Testing quiz sheet. Test areas and DOC security information redacted.	RCW 42.56.240(1) RCW 42.56.250(1)
01400004-7	DT Written Test key. Test questions and answers redacted.	RCW 42.56.240(1) RCW 42.56.250(1)
01400008-11	DT Written Test form. Test questions redacted.	RCW 42.56.240(1) RCW 42.56.250(1)

01400012-141	Defense Tactics Manual 2016. DOC security information redacted; officers' photos redacted.	RCW 42.56.240(1) RCW 42.56.250(9)
01400142-146	Prisons Division In-service Control Tactics 2016 training synopsis. DOC security information redacted.	RCW 42.56.240(1)

In addition, fixed camera video footage (not showing the incident; not from the day of the incident but from the camera that would have been involved if it had been aimed toward the scene that day) has been withheld. The declaration of DeMars (dkt. no. 53) addresses the existence of this camera, and the fact that it does not show anything related to the incident involving Mr. Lewis.

#### IV. DEFENDANT'S ARGUMENT

##### A. USE OF FORCE POLICIES AND RELATED MATERIALS

The Court has broad discretionary powers to control discovery. *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988). Upon showing of good cause, the Court may deny or limit discovery “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]” Fed. R. Civ. P. 26(c); *see also GTE Wireless, Inc. v. Qualcomm, Inc.*, 192 F.R.D. 284, 285–86 (S.D. Cal. 2000). To obtain a protective order, the party resisting discovery or seeking limitations must, under Rule 26(c), show good cause for its issuance. The moving party must make a clear showing of a particular and specific need for the order. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975).

The United States District Court for the Eastern District of Washington has indicated its willingness to apply the cited RCW § 42.56.240(1)'s exemption to civil discovery requests where the information sought is “essential to effective law enforcement.” *Hinkley v. Jessee*, 2015 WL 13333944 at \*4, n.2. (E.D. Wash. October 7, 2015). The Declaration of Robert Herzog, submitted herewith, establishes this fact clearly with reasons both with regard to the issues of use of force policies and training, as well as information about the video surveillance system.

1 In addition, “Federal common law recognizes an ‘official information’ privilege that  
 2 extends to the security considerations applicable to correctional facilities.” *Whittington v. Sokol*,  
 3 2008 WL 435277, at \* 1 (D.Colo. Feb. 14, 2008) (citing *Jackson v. Brinker*, 147 F.R.D. 189,  
 4 202 (S.D.Ind.1993) (acknowledging the judicial deference due to prison managers in matters of  
 5 institutional management); *Thornburg v. Abbott*, 490 U.S. 401, 415 (1989) (stating that the  
 6 legitimacy of the goal of protecting prison security is “beyond question”); *Toussaint v.*  
 7 *McCarthy*, 801 F.2d 1080, 1104 (9th Cir.1986) (“Courts must accord wide-ranging deference to  
 8 prison administration ‘in the adoption and execution of policies and practices that in their  
 9 judgment are needed to preserve internal order and discipline and to maintain institutional  
 10 security’”).

11 “It should be noted, however, that the official information privilege is not absolute. In  
 12 determining what level of protection should be afforded by this privilege, courts conduct a case  
 13 by case analysis, in which the interests of the party seeking discovery are weighed against the  
 14 interests of the government entity asserting the privilege.” *Whittington* at \*1–2 (citing *Soto v. City*  
 15 *of Concord*, 162 F.R.D. 603, 613 (N.D.Cal.1995)). The *Whittington* court cited with approval  
 16 *Castle v. Jallah*, 142 F.R.D. 618, 622 (E.D.Va. 1992). In that case, an inmate plaintiff also  
 17 alleged excessive use of force. The Court held that disclosure of confidential department  
 18 operating policies would jeopardize the security of the institution. That is the same result the  
 19 Court should reach after applying the appropriate rationale from the cases. The Court should bar  
 20 production of these sensitive policies and training materials.

21 The information contained in the redacted portions of the policy contain information that,  
 22 if disclosed, would compromise the safety and security of the staff of the Department of  
 23 Corrections, as well as the safety of those individuals placed under DOC supervision. Should an  
 24 un-redacted copy of the policy make its way into the hands of inmates or offenders under DOC  
 25 supervision, it is foreseeable that attempts to use the policy against a DOC officer which would  
 26 result in standoffs and “pushing the line” under the policy. This would result in more danger to

DOC officers as well as to the offenders trying to use the policy in an offensive manner. The need for confidentiality of these redacted portions for security reasons outweighs the need for disclosure pursuant to the Federal common law “Official Information Privilege.” *See* declaration of Herzog, ¶¶ 3-4, 8-10.

Good cause therefore exists under Fed.R.Civ.P. 26(c) to limit production of this restricted policy. *See, e.g., Fourhorn v. City and County of Denver*, 261 F.R.D. 564 (D. Colo. 2009) (court issued a protective order which prohibited dissemination of jail policies and security information noting ample case law addressing issues related to jail or prison security and safety).

For these reasons, the un-redacted policy and related materials on Use of Force should not be released to plaintiff. However, should the Court decide to inquire further, an *in camera* review should take place. Only after the court satisfies itself that the material is relevant should it consider production.

#### **B. VIDEO SURVEILLANCE INFORMATION**

The Defendant has produced hand held video taken at the time of the incident. The Declaration of Steven DeMars established that no other video existed of the incident. That declaration however was redacted to eliminate sensitive information. *See*, docket no. 53.

The issue of the video surveillance system is addressed in detail in the Declaration of Robert Herzog and the rationale for invoking the security privilege is explained. *See* Declaration of Herzog, ¶¶ 10-17. This is not a situation where the inmates know the camera locations. The uncertainty and highly confidential nature of that information is explained by Assistant Director Herzog in his declaration. *Id.*

In *Florer v. Schrum*, this Court was confronted with an identical discovery request from an inmate who likewise had sued DOC in connection with an alleged prison assault. 2012 WL 2995071 (W.D. Wash. July 23, 2012). There, despite the fact that it had previously ordered

1 production,<sup>1</sup> the Court concluded that in light of the serious institutional security concerns raised  
 2 by DOC, production should occur only under significant limitations as specified in its protective  
 3 order. *Id.*

4 Since *Florer v. Schrum*, Washington courts have spoken on a number of occasions  
 5 regarding the production of prison surveillance video. In *Gronquist v. Dep't of Corr.*, 177 Wn.  
 6 App. 389, 400-401, 313 P.3d 416 (2013), Washington's Court of Appeals held that footage  
 7 captured by DOC surveillance systems falls "squarely within" the definition of "specific  
 8 intelligence information" compiled by a penology agency and was thus exempt from disclosure  
 9 under RCW § 42.56.240(1). Despite the broad disclosure mandate under Washington's Public  
 10 Records Act, the court held that nondisclosure was "essential to effective law enforcement" and  
 11 denied production. *Id.* (citing *Fischer v. Dep't of Corr.*, 160 Wn. App. 722, 727-28, 254 P.3d  
 12 824 (2011)). While the plaintiff may argue that DOC's concerns can be ameliorated by producing  
 13 the footage to his counsel, Washington courts have been equally unreceptive to that argument.  
 14 See *Gaston v. Dep't of Corr.*, 4 Wn. App. 2d 1057, 2018 WL 3548392 (2018).

## 15 V. CONCLUSION

16 The Court should enter a protective order and bar further production of any policies or  
 17 materials related to training in the use of force. The Court should end the inquiry into the video  
 18 surveillance system in this case.

19 In any event, the Court should not release the un-redacted policy to plaintiff directly.  
 20 Instead, if the court is so inclined, an in camera review should take place. If production is  
 21 required, the State requests that the policy be released under a protective order and that the policy  
 22 only be released to plaintiff's counsel. Plaintiff, or any other member of the general public,  
 23 should not be given a copy of the un-redacted policy. If filed with the court, the policy should  
 24

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25 <sup>1</sup> The Court in *Florer* had already ordered production because DOC had previously failed to meet its burden  
 26 of establishing the sensitive nature of the video requested in response to the plaintiff's prior motion to compel.  
*Florer v. Schrum*, 2012 WL 925968 at \*2-3 (W.D. Wash. March 19, 2012). Here the declaration of Herzog  
 establishes the requisite sensitivity for a protective order.



1 be filed under seal. At the conclusion of litigation, any copies of the policy in possession of  
 2 Plaintiff's counsel should be returned to the Department of Corrections or be destroyed.

### 3 VI. PLAINTIFF'S ARGUMENT

4 The information sought is essential for the Plaintiff to argue the merits of his claim.  
 5 Without this information, the Plaintiff has no context for the Defendant's conduct or making the  
 6 case that the Defendant's conduct was objectively unreasonable.

7 [T]he question is whether the officers' actions are objectively reasonable in light  
 8 of the facts and circumstances confronting them, without regard to their  
 9 underlying intent or motivation. This analysis requires balancing the nature and  
 10 quality of the intrusion on a person's liberty with the countervailing governmental  
 11 interests at stake to determine whether the use of force was objectively reasonable  
 12 under the circumstances. Among the factors considered are the need for, and the  
 13 severity of, the force applied.

14 *Byrd v. Phoenix Police Dep't*, 885 F.3d 639, 642 (9th Cir. 2018) (citations omitted). The Plaintiff  
 15 cannot make this argument in a void. The "facts and circumstances confronting" an officer are  
 16 heavily influenced by the information sought by Plaintiff.

17 "Under the liberal discovery principles of the Federal Rules defendants [are] required to  
 18 carry a heavy burden of showing why discovery was denied." *Blankenship v. Hearst Corp.*, 519  
 19 F.2d 418, 429 (9th Cir. 1975). The Defendant cannot meet this heavy burden in the instant case.  
 20 Federal Rule of Civil Procedure 26(c)(1) gives the Court broad powers to craft a Protective Order  
 21 to suit the needs of the case, including (B) specifying terms, including time and place or the  
 22 allocation of expenses, for the disclosure or discovery; and (E) designating the persons who may  
 23 be present while the discovery is conducted. This includes the production of materials as  
 24 "Attorneys' Eyes Only" or having the Court conduct an in camera review for relevant evidence.

#### 25 A. Defendant Should Produce the Use of Force Policies Unredacted.

26 To argue Defendant's actions were objectively unreasonable, Plaintiff must present a  
 case with knowledge of the force options available to Defendant, whether the type of force  
 applied in this case is authorized at all, and if so, at what time. "The first factor in determining



1 whether the force used was excessive is the severity of the force applied.” *Tekle v. United States*,  
 2 511 F.3d 839, 844 (9th Cir. 2007). Plaintiff has no context for assessing the severity of the force  
 3 applied because the Defendant has not produced the necessary information.

4 Officer Pugh stated in his Declaration that he “applied a single impendance strike, a right  
 5 elbow to the left cheek of Mr. Lewis’ face” to protect himself. (dkt. no. 46, pg. 3). Defendant  
 6 produced a document labeled “00700001\_26\_410200 06-23-14 REDACTED”, which purports  
 7 to contain the use of force policies of the State of Washington Department of Corrections in the  
 8 setting of a prison. However, in the section titled “The following are the available force options .  
 9 . . .”, the options are redacted. *Id.* at 00700004. For this reason, there is no way for Plaintiff to  
 10 know whether the Defendant’s elbow impendance strike is an authorized use of force, let alone  
 11 a severe one. Further, the sections of the policy titled “Passive Resistance Response”, “Active  
 12 Resistance Response”, “Intermediate force options include”, and “Force Options Guidelines” all  
 13 appear to contain lists of when certain types of force are authorized and are all similarly redacted.  
 14 Without this information, the Plaintiff cannot argue that the severity of the force applied was  
 15 great or small because there is no basis for comparison. The remaining discovery sought contains  
 16 similar information.

17 Without this knowledge and context, Defendant can maintain that his use of force was  
 18 objectively reasonable and intimate that nothing out of the ordinary occurred here based on the  
 19 “facts and circumstances.” Withholding this information places an unnecessary burden on the  
 20 Plaintiff to recreate for a jury this comprehensive panoply of action and reaction. Especially  
 21 when the Plaintiff is an inmate, this burden is prohibitive.

22 Plaintiff also seeks an Order from the Court directing Department employees or former  
 23 employees to answer questions at deposition that might reveal information contained within  
 24 these policies. Plaintiff desires to ask Defendant whether an elbow to the face of an inmate was  
 25 an authorized use of force, without objections. As far as the Defendant’s arguments against  
 26

1 disclosure, the limited security risk posed by answering such limited questions about these  
2 policies weighs heavily in favor of allowing these questions to be answered.

3 This case involves a constitutional claim that Defendant violated Plaintiff's constitutional  
4 rights by using excessive force. The Plaintiff deserves to know what guidelines the Defendant  
5 followed, or did not follow, for using force on Plaintiff.

6 **B. Defendant Should Answer Questions About and Produce Video Surveillance.**

7 In pursuing this claim, Plaintiff wishes to determine whether video surveillance exists,  
8 was later hidden, destroyed, intentionally prevented, or whether there could be witnesses to live  
9 video footage that was not recorded. The Defendant asserted privilege to every question intended  
10 to pursue these inquiries in Defendant's Response to Plaintiff's First Set of Interrogatories and  
11 Requests for Production, Interrogatories No. 18 through 21.

12 The Plaintiff cannot simply take the word of Defendant's coworkers that there is no video  
13 footage. It is also difficult to understand how a critical area such as the yard is not monitored by  
14 video surveillance at all times (dkt. no. 46, pg. 2). Without answers to whether the area was  
15 monitored, but not recorded, or whether there are nearby cameras that were simply out of range,  
16 the Plaintiff cannot be satisfied that no video footage exists or should exist but was spoliated.  
17 These are not delusional theories so outside the realm of possibility that the Plaintiff should be  
18 denied an opportunity to pursue them. They are reasonable inquiries when compared with the  
19 gravity of the potential harm. The Government's interest is not so important as to evade all  
20 reasonable inquiry into the excessive use of force of its Officers.

21 Defendant's citation to *Gaston v. State Dep't of Corrections*, 4 Wn. App. 2d 1057 (2018)  
22 does not have any bearing in this instance. This is not a case involving an inmate, current or  
23 former, pursuing a Public Records Act claim. This is a civil rights claim, granting the Court the  
24 full powers of the Rules of Civil Procedure to craft discovery orders. Neither is Plaintiff seeking  
25 discovery "of the full recording capabilities of those systems" that Washington courts have  
26 deemed "critical to [the Department's] effectiveness in the specific setting of a prison." *Id.* (citing

1 *Fischer v. Washington State Dep't of Corrections*, 160 Wn. App. 722, 728, 254 P.3d 824 (2011)).

2 Plaintiff's questions are intended to answer only those concerns related to resolving his claim.

3 The Defendant's claims are belied by Plaintiff's willingness to restrict disclosure to  
4 Plaintiff's attorneys at a time and place of Defendant's choosing. Similarly, answering questions  
5 in deposition about these matters, if the contents are kept sealed, has little if any potential to  
6 compromise prison security.

## 7 **VII. PLAINTIFFS' CONCLUSION**

8 There is every reason available to allow Plaintiff to pursue this claim and every  
9 opportunity to protect sensitive information at the same time. Plaintiff respectfully requests the  
10 Court to Order Defendant to produce the use of force policies and materials listed above in  
11 unredacted form. If necessary, Plaintiff is willing to view these policies, along with video  
12 records, at a time and place of Defendant's choosing.

13 Plaintiff further asks the Court to direct Defendant, and witnesses supplied by Defendant,  
14 to answer questions at deposition related to the subjects of this discovery dispute, including use  
15 of force policies and video surveillance locations and certain capabilities specified in Plaintiff's  
16 First Set of Interrogatories and Requests for Production, Interrogatories No. 18 through 21.  
17 Defendant should also be required to answer these Interrogatories.

18 DATED: August 19, 2019.

19  
20 By           /s/Dan N Fiorito III          ,  
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**CERTIFICATION**

I certify that the full response by the responding party has been included in this submission, and that prior to making this submission the parties conferred to attempt to resolve this discovery dispute in accordance with LCR 37(a).

DATED: August 19, 2019

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**CERTIFICATE OF SERVICE**

I hereby declare that on this 19th day of August, 2019, I caused to be electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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DATED this 19th day of August, 2019.

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